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In the Supreme Court

of the United States.

No. [redacted]iginal, October Term, 192[redacted] 776

THE STATE OF COLORADO, *Complainant*,

vs.

THE STATE OF KANSAS and THE FINNEY COUNTY WATER USERS' ASSOCIATION, a Corporation, *Defendants.*

SEPARATE ANSWER OF THE STATE OF KANSAS.

WILLIAM A. SMITH,
Attorney-general of the State of Kansas,
JOHN G. EGAN,
Assistant Attorney-general of the State of Kansas,
CHESTER I. LONG,
Solicitors for the State of Kansas.

12-6668

In the Supreme Court of the United States.

No. 14 Original, October Term, 1928.

THE STATE OF COLORADO, *Complainant*,

vs.

THE STATE OF KANSAS and THE FINNEY COUNTY WATER USERS' ASSOCIATION, a Corporation, *Defendants.*

SEPARATE ANSWER OF THE STATE OF KANSAS.

The state of Kansas, a state of the Union, by leave of court, files this its answer to the bill of complaint filed herein by the state of Colorado, and respectfully sets forth:

FIRST.

This defendant, the state of Kansas, admits the allegations in the first paragraph of the bill of complaint.

SECOND.

This defendant admits the allegations in the second paragraph of the bill of complaint.

THIRD.

This defendant admits the allegations in the third paragraph of the bill of complaint not herein denied, or as to which it states it is without knowledge.

This defendant denies that the Arkansas river is a nonnavigable stream, and denies that it flows for a distance of about 200 miles in Kansas; but alleges that it flows for a distance along the river of

about 370 miles through Kansas. This defendant denies that the slopes of the banks and the bed of the river are scarcely distinguishable from the flat contour of the open prairie; and alleges that said river in Colorado and Kansas has well defined and marked banks and bed. This defendant denies that along the course of said river in Colorado, there are no material sources of water either in wells or subterranean flows; and denies that more than a few of the cities, towns, villages and hamlets in Colorado are dependent upon the waters flowing in the channel of said river for domestic and manufacturing uses, fire protection, and the customary requirements of a population; and denies that the annual precipitation in the form of snow and rain in the lands in Colorado bordering said river and its tributaries gradually increases from a minimum of about 10 inches per annum where the river first ceases to be a mountain stream, and becomes available for agricultural and domestic use, to about 15 inches per annum at the eastern border of Colorado; but alleges that such annual precipitation gradually increases from about 12 inches per annum where the river first ceases to be a mountain stream to about 16 inches per annum at the eastern boundary of Colorado. This defendant denies that a large part of the population of Colorado is dependent upon the use of the waters flowing in said river and its tributaries for carrying on the arts and industries of life and for maintaining existence; and denies that fourteen counties in Colorado, namely, Lake, Chaffee, Custer, Fremont, Pueblo, El Paso, Huerfano, Otero, Crowley, Las Animas, Baca, Kiowa, Bent and Prowers, are dependent upon said river and its tributaries within Colorado for the fundamental requirements of life; and denies that more than 640,000 acres devoted to agriculture in Colorado are, and for many years have been, entirely dependent upon the Arkansas river and its tributaries for irrigation water, and would, without its continued use and availability, revert to deserted prairies within

a few months; and denies that the cities of Salida, La Junta, Lamar, and a large number of smaller cities, towns and settlements are dependent for water upon the natural discharge of said river and its tributaries.

This defendant is without knowledge whether more than $20,000,000 has been expended in the construction of ditches and canals for agricultural purposes, and as much more in the construction of municipal and manufacturing facilities for the diversion and use of water by cities, towns and the industries located within them, in the basin of the Arkansas river and its tributaries in Colorado.

This defendant denies that since the year 1900 there has been no substantial alteration in the quantity of water beneficially applied within Colorado from the Arkansas river and its tributaries.

FOURTH.

This defendant admits the allegations in the fourth paragraph of the bill of complaint not herein denied.

This defendant alleges that the rainfall and snowfall in the lands along the course of the Arkansas river in Kansas for a distance of about 190 miles from the western line of the state are not sufficient for the growth of crops and the support of settlements without the aid of irrigation; but denies that in such district irrigation has been practiced spasmodically; and alleges that within such district irrigation has been practiced regularly when water has been obtainable from the Arkansas river; and admits and alleges that prior to 1900 over 70,000 acres of agricultural land derived, and has since when water could be obtained from the river, continued to derive water from the said river within the state of Kansas, but that such use has not been supplemental in ordinary years, but has been principal in such years when the water could be obtained, and has also been the principal use in years of unusual drouth; and denies that by reason of natural conditions in such district the state of Kansas has

not been required to develop and has not developed irrigation institutions, irrigation structures and irrigation laws and practice at all comparable with those developed in Colorado; and denies that the riparian doctrine prevails in such district in the state of Kansas; and alleges that the state of Kansas has developed irrigation institutions, irrigation structures and irrigation law and practices governing such district, but that by reason of the taking of the water from said river and its tributaries in Colorado by authority of the state of Colorado, the flow of water in said river into Kansas from Colorado has been steadily and continuously diminished in all the period from the year 1880 to the year 1928, inclusive; and that as a result thereof the development of irrigation in that district in the state of Kansas has been greatly obstructed, diminished and delayed, and the maintenance and conduct of irrigation in that district in Kansas has been greatly injured and diminished.

This defendant alleges that the statutes of Kansas have authorized the taking and use of water for the purposes of irrigation of agricultural lands and incidental purposes since the year 1868, and states that:

In 1868 it was provided that private corporations could be organized for the construction and maintenance of canals for irrigation (sections 4 and 5, chapter 23, pp. 191, 192, General Statutes of Kansas, 1868), and canal corporations for the purpose of irrigation were authorized to construct canals and to furnish water for irrigation at rates which they might fix (section 89, chapter 23, pp. 214, 215, *id.*).

In 1876 authority was given to condemn lands for the use of irrigation corporations, and it was provided that the waters of a stream could not be taken for irrigation in such manner as to interfere with, hinder, delay or injure any milling or irrigating improvements already constructed upon the stream, or to diminish the supply of

water to or through any established irrigation canal; and an irrigating company was permitted to sell or lease its water, and to convey water by means of pipes or canals. (Sections 1 and 2, chapter 58, Session Laws of Kansas, 1876.) This statute took effect upon March 15, 1876, and before Colorado became a state of the Union.

In 1885 a lien was granted upon a crop raised by irrigation on account of water furnished on a contract for such irrigation (chapter 133, Session Laws of Kansas, 1885), and a penalty was imposed for certain willful or malicious injuries to a ditch or canal used for irrigation (chapter 134, Session Laws of Kansas, 1885).

In 1886 authority was given to appropriate water flowing in a river or stream for the purpose of irrigation. It was provided that the appropriator first in time should be first in right; the place of diversion could be changed if the change could be made without injury to others; an irrigating canal could be extended, and provision was made for the method of posting a notice in order to appropriate water (sections 1 to 5, inclusive, chapter 155, Session Laws of Kansas, 1886), and the acquisition of title for right of way to a canal by lapse of time was regulated. (Sections 6, 7 and 8, *id.*)

In 1891 it was provided that in that portion of Kansas west of the 99th meridian (and which meridian intersects the Arkansas river at a point about 160 miles in a direct line east of the west line of Kansas) all natural waters could be diverted first to irrigation in aid of agriculture, subject to ordinary domestic uses, and, second, to other industrial purposes, but no diversion could diminish or divest any prior vested right of appropriation for the same or a higher purpose, without condemnation and compensation (section 1, article 1, chapter 133, Session Laws of Kansas, 1891).

It was provided that the appropriation of water could be effectual only as to so much as should be actually applied to beneficial uses within a reasonable time after the commencement of the irrigation

works. Section 2 and section 7, article 1, *id.*) The appropriation and use of water and priority of rights thereto for irrigation were regulated by this act in extensive detail.

By another act of 1891, there was an amendment to the prior statute on the subject of condemning land for right of way for irrigation and other purposes; but waters of a stream could not be taken in such a manner as would interfere with, hinder, delay or injure any milling or irrigation improvement already constructed or located upon the stream, or diminish the supply of water flowing to or through an established irrigating canal (chapter 85, Session Laws of Kansas, 1891).

In 1899, the last-named statute was again amended but did not restrict the provisions referred to. In the same year the condemnation of lands was authorized for a reservoir for the storage of water for irrigation (chapter 152, Session Laws of Kansas, 1899).

In 1923 in the revision of the statutes, the subject of irrigation was fully treated; corporations could be organized for irrigation purposes; authority was given to condemn the right to take water for irrigation from any stream in Kansas; the methods of condemnation were prescribed; the right to take water flowing in a stream for irrigation continued to be recognized; the method of initiating the right was regulated; rights of way for irrigation canal could be condemned.

Among other things, the substance of the provisions in chapter 133, Session Laws of Kansas, 1891, concerning the appropriation and use of waters for irrigation west of the 99th meridian were carried into the revision. (Sections 17-202 and 42-109 to 42-329, inclusive, Revised Statutes of Kansas, 1923.)

Copies of portions of the Kansas statutes hereinbefore referred to and index references to other portions are attached to this answer as Appendix A, and made a part hereof.

FIFTH.

This defendant admits the allegations of fact in the fifth paragraph in the bill of complaint not herein denied.

This defendant alleges, whatever may be the constitution, laws or administrative system of Colorado, that neither of them has any extraterritorial effect, or is binding upon this defendant, or in any way invalidate or qualify its rights and those of its citizens and residents as hereinafter set forth.

This defendant denies that Colorado owns all of the flowing water within the limits of that state, and especially the flowing water of the Arkansas river and its tributaries; and alleges that the same is an interstate stream and the waters therein must be shared equitably between the citizens and residents of Colorado and the citizens and residents of Kansas.

This defendant denies that the conduct of Colorado in regard to the appropriation and use of water for irrigation and other purposes in Colorado has been actually in subordination to those limitations which this court has determined to exist as between Colorado and other state or states, and alleges that the conduct of Colorado in such matters has been without regard for and in violation of the rights of Kansas and of the citizens and residents of Kansas, and in violation of the decisions of this court. This defendant denies that the conduct of Colorado in such matters has been in a sovereign capacity.

SIXTH.

This defendant admits the allegation of the sixth paragraph of the bill of complaint, excepting those herein denied.

This defendant denies all of the conclusions of law set forth in said paragraph, and alleges that said paragraph is composed almost entirely of a legal argument and citations of authorities which have

no place in a bill of complaint, and which this defendant will meet upon the final argument of this case.

This defendant further states that this court will take judicial notice of the constitution and laws of Colorado, and will interpret and apply or refuse to apply the same in its final judgment.

This defendant denies that Colorado has assumed responsibility in a sovereign capacity for such obligations, if any, with regard to the water flowing in the Arkansas river as it bore to Kansas; and denies that Colorado has recognized the procedure provided by the Constitution of the United States for the settlement of any claims against Colorado by means of compacts between the states, and by means of the determinations of the Supreme Court of the United States; and denies that any appropriations which have been made by sessions of the Colorado legislature have been for the defense of any sovereign rights of the state of Colorado in the Arkansas river and the water flowing therein; and alleges that whatever rights Colorado has to the water flowing in the Arkansas river, or its tributaries in Colorado, are not sovereign, but are qualified and limited, among other things, by the rights of Kansas and citizens and residents of Kansas.

This defendant alleges that the laws of Colorado and the administration thereof under its direction and authority have operated to appropriate for the use of irrigators in Colorado water flowing in the Arkansas river and its tributaries in Colorado which this defendant and its citizens and residents have a right to be permitted to flow from Colorado into Kansas, and have a right to use the same for municipal, domestic, manufacturing and irrigations purposes in the valley of the Arkansas river in Kansas.

SEVENTH.

This defendant admits the allegations in the seventh paragraph of the bill of complaint not herein denied, or as to which this defendant states it is without knowledge.

This defendant denies that the claims to the use of water from the Arkansas river and its tributaries in Colorado for irrigation in that state constitute rights as against the state of Kansas, its citizens and residents; and denies that those claims are limited in quantity to the necessities of time and place and of economic utilization; and denies that the diversion of water by such claimants depends upon an acquaintance and intimate knowledge of time and place of use, and requires the constant exercise of human discretion. This defendant denies the water in the Arkansas river and its tributaries in Colorado is owned by that state, and denies that under the administration of water by Colorado a uniform use with a maximum economy and consideration of the public welfare is maintained, and that any interruption of such administration would effect confusion or come into collision with express provisions of the laws of Colorado, or produce serious public consequences or disaster to the general welfare of the citizens and residents of Colorado. This defendant denies that any adjudication in favor of claimants to the use of waters in Kansas from the Arkansas river against any appropriators of water in Colorado would result in the destruction of the governmental system maintained by Colorado, or would be in collision with statutory provisions of Colorado, or would disrupt the governmental system of Colorado with respect to water, or would be impossible of intelligent or lawful administration, or would produce public disorder.

This defendant is without knowledge as to the compacts alleged by the plaintiff concerning water in interstate streams between Colorado and other states, but denies that there is any compact

now in process of negotiation between Colorado and Kansas concerning the use of waters flowing in the Arkansas river.

This defendant denies that the climatic zones are materially different along the Arkansas river from the base of the mountains in Colorado to a point measured along such river about 190 miles east of the west line of Kansas; and alleges that in the portion of the Arkansas valley last referred to in Kansas it is necessary for successful farming that irrigation should be practiced.

This defendant does not admit the conclusions of law and legal argument set forth in paragraph seven in the bill of complaint, and states that matters of legal argument should not be set forth in the bill of complaint, but should be heard upon the final hearing of this case.

EIGHTH.

This defendant admits the allegations contained in paragraph eighth of the bill of complaint, but denies the conclusions of law and legal argument contained therein.

This defendant alleges that in the case of *Kansas v. Colorado*, the bill of the state of Kansas was dismissed without prejudice to its right "to institute new proceedings whenever it shall appear that through a material increase in the depletion of the waters of the Arkansas by Colorado, its corporations or citizens, the substantial interests of Kansas are being injured to the extent of destroying the equitable apportionment of benefits between the two states resulting from the flow of the river"; and denies that in said case this court determined that the quantity of water represented by the appropriations and diversions existing and carried on within the state of Colorado, under its authority in the year 1907, was within the lawful rights of Colorado, its corporations and citizens; and denies that the continuance of such appropriations and diversions was in legal effect quieted to Colorado, its corporations and citizens.

NINTH.

This defendant denies that in reliance upon the adjudication in *Kansas v. Colorado*, the residents and citizens of Colorado have continued the diversions and use of the waters of the Arkansas river to the extent only that the same existed and were in actual use at the dates included within the issues and testimony in said case; and alleges that Colorado and its residents and citizens have, since May 20, 1901, the date of the filing of the bill of complaint in the case of *Kansas v. Colorado*, greatly increased the diversion and use for irrigation, and for agricultural purposes, of water of the Arkansas river and its tributaries in Colorado, and have so continued to do until the filing of the bill of complaint in this case, on or about January 3, 1928; and that at the last mentioned date and for a long time prior thereto Colorado and its residents and citizens, by its permission and asserted authority, diverted and used for irrigation for agricultural purposes in Colorado, the waters of the Arkansas river and its tributaries to a much greater amount than they had diverted and used the same for such purposes at the time of the filing of the bill of complaint in *Kansas v. Colorado*.

This defendant alleges that Colorado, its residents and citizens, under its permission and aid and with its asserted authority, have during the same period greatly increased the number, extent and capacity of reservoirs and ditches for the taking of water from the Arkansas river and its tributaries in Colorado for irrigation for agricultural purposes, and greatly increased the acreage which has been irrigated in Colorado by the use of waters from the Arkansas river and its tributaries, either directly or through such reservoirs. During the period therein from 1909 to 1912, inclusive, the construction of at least twenty-three reservoirs to store water from the Arkansas river or its tributaries in Colorado was authorized by the state engineer of Colorado, and such authorization is shown by the published

reports of said engineer. Most of such reservoirs have been constructed and used for the purpose aforesaid. A list of such reservoirs so authorized is set forth in Appendix B, attached hereto and made a part hereof.

This defendant states that the number of acres of land irrigated for agricultural purposes in Colorado from the waters of the Arkansas river and its tributaries in the year 1900 was about 317,015, and in the year 1926 was about 544,876, an increase of over 71 per cent. In that period, with some mutations, there was a course of increase of such acreage. Approximately the number of acres so irrigated in Colorado for the biennial years 1900 to 1926, excepting three of such years for which the biennial reports contain no record on that point, is set forth upon appendix C, attached hereto and made a part hereof, and the same are shown upon the published biennial reports of the state engineer of Colorado.

This defendant denies that no material increase has been made in Colorado in the depletions of the water of said river and its tributaries, and denies that the substantial interests of Kansas have not been detrimentally altered by the taking of such waters in Colorado, or that the equitable apportionment of benefits by use of the waters of said river have not been disturbed since the dates included within the issues and testimony in said case of *Kansas v. Colorado;* and denies that any changes in the meantime are immaterial; and denies that at the time of the filing of the bill of complaint in this case the waters flowing by the Arkansas river into Kansas vastly exceeded the quantity to which Kansas, its citizens and residents, were entitled under any doctrine of equitable apportionment.

This defendant alleges that from the time of the filing of the bill of complaint in *Kansas v. Colorado,* continuously until the time of the filing of the bill of complaint in this case, the amount of water taken in Colorado from the Arkansas river and its tributaries by

Colorado, or by its residents or citizens, under its permission, aid or asserted authority, has been greatly increased; and that the depletion of the water of the Arkansas river flowing into Kansas has thereby been greatly increased; and that the substantial interests of Kansas, its residents and citizens, have been detrimentally altered by said conduct of the state of Colorado, its residents and citizens.

This defendant denies that Colorado has not materially altered the quantity of water available within the state of Kansas since the filing of the bill of complaint in the case of *Kansas v. Colorado;* and alleges that Colorado, its citizens and residents, have greatly increased the taking and use of water from the Arkansas river and its tributaries in Colorado during the period mentioned, all to the expense and injury of Kansas, its residents and citizens; and alleges that thereby irrigation of agricultural lands from the waters of the Arkansas river in Kansas has been greatly injured, obstructed and diminished.

TENTH.

This defendant admits the allegations in paragraph tenth of the bill of complaint not herein denied, or as to which it states it is without knowledge.

This defendant is without knowledge whether the taxable value of lands and property in Colorado dependent upon the water in the Arkansas river and its tributaries in Colorado has substantially increased since the year 1907, or whether in that period there have been substantial additions to various municipal and state properties in Colorado; but if there have been any such increases this defendant denies that the same have been based upon any reliance of Colorado, its residents and citizens, upon the adjudication of this court in the case of *Kansas v. Colorado;* and denies that any expenditures and any labor and investigation by Colorado in reference

to the appropriation and use of water for irrigation in Colorado from the Arkansas river and its tributaries has been in reliance upon such decision; but alleges that any such actions of Colorado have been in violation of that decision.

ELEVENTH.

This defendant admits the allegations of paragraph eleventh of the bill of complaint not herein denied.

This defendant denies that any suits which have been brought by residents or citizens of Kansas against residents or citizens of Colorado have been in defiance of the principles laid down in the case of *Kansas v. Colorado;* but alleges that any suits which have been so brought have been brought to enforce a priority of rights of water appropriation of irrigators in Kansas as against irrigators in Colorado under the well settled adjudications of the lower federal courts and of this court; and that such suits have been brought and maintained to assert individual rights of priority which were never considered or adjudicated in the case of *Kansas v. Colorado;* and this defendant denies that Colorado was a necessary party to either of those three suits, or to the two suits now pending brought by the Finney County Water Users' Association in the United States District Court for Colorado, and referred to in the bill of complaint; and alleges that all of such suits were and are private suits to establish private rights.

TWELFTH.

This defendant admits the allegations of the twelfth paragraph of the bill of complaint which are not herein denied, or as to which it states it is without knowledge.

This defendant has no knowledge as to the defenses made by the defendants in the three cases in the United States District Court for Colorado referred to in said paragraph, or as to the rulings of said court, or as to whether said court will finally adjudicate the

rights of the Finney County Water Users' Association as against the defendants in the two cases brought by said association.

This defendant denies that the issues presented in the suit brought by the United States Irrigating Company in the United States District Court for Colorado against the Graham Ditch Company *et al.*, were adjudicated in this court in the case of *Kansas v. Colorado;* and denies that the United States Irrigating Company in that suit sought to have its increased superiority of appropriation enforced without regard to the policy of Kansas. This defendant is without knowledge whether the plaintiff in said suit alleged that Colorado had exceeded its equitable and relative rights in the flow of the river as determined in the case of *Kansas v. Colorado;* and is without knowledge whether it is against the practice, procedure and law of Colorado that water officials must be joined as defendants in any suits affecting relative priorities or the diversion and use of waters of the streams in Colorado; and is without knowledge whether the plaintiff in said suit pleaded the litigation and conclusion of the case of *Kansas v. Colorado;* or whether it appeared in the bill of complaint in said suit that all of the defendants therein had been operating through themselves, or their predecessors in interest, the same irrigation enterprises, or had been claiming the same rights prior to the litigation in *Kansas v. Colorado;* but denies that such matters had been fully presented in *Kansas v. Colorado;* and alleges that the issues in said suit in the district court for Colorado had not been determined in the case of *Kansas v. Colorado.*

This defendant admits that some, but denies that others, of the defendants in said suit in the United States District Court had, either in their own persons or through direct predecessors in interest, been named as individual defendants, and had pleaded as such in the case of *Kansas v. Colorado.* This defendant denies that the District Court in said suit assumed the right to determine the rela-

tive rights of Colorado and Kansas in the waters of the Arkansas river; and denies that the defendants therein bought the dismissal of said suit by the payment of a money consideration to the plaintiff.

This defendant denies that the Finney County Water Users' Association was led to bring either of its suits in the United States District Court for Colorado by any success of the United States Irrigating Company in its suit; and denies that any rights asserted in the suit by the Finney County Water Users' Association had been pleaded, considered and adjudicated in the case of *Kansas v. Colorado.*

This defendant is without knowledge whether either bill of complaint filed by the Finney County Water Users' Association was substantially a verbatim copy of the bill of complaint filed by the United States Irrigating Company; or that it contained the same general allegations, or stated the same cause of action against the same defendants.

This defendant is without knowledge as to whether there were many errors in either bill of complaint filed by the Finney County Water Users' Association. This defendant admits that some of the defendants, but denies that others of the defendants in said suits last named, either themselves or through predecessors in interest, were included among the defendants impleaded in the case of *Kansas v. Colorado;* but denies that the rights, history, acts and appropriations of the Finney County Water Users' Association and of the defendants in either suit brought by it were involved in, presented, litigated, considered or determined in the case of *Kansas v. Colorado;* and denies that the consequences of the acts, diversions and claims of both were fully presented, involved and litigated in the case of *Kansas v. Colorado;* and denies that any such matters appear of record in the case of *Kansas v. Colorado.* This defendant denies that in either of said suits brought by the Finney County

Water Users' Association, the United States District Court for the district of Colorado has announced its intention to determine the limits of the equitable benefits of Colorado and of Kansas to the waters flowing in the Arkansas river; and denies that the plaintiff in either of said suits, unless prevented by this court, will proceed to litigate in the Federal District Court any rights or claims of Colorado.

Referring to the second suit brought by the Finney County Water Users' Association in the United States District Court in Colorado against the Coler Ditch and Reservoir Company *et al.*, this defendant denies that no reason appears for the selection of the defendants in said suit; and denies that many of the defendants therein have no interest in the actual diversion and application to beneficial uses of waters of the Arkansas river. This defendant is without knowledge whether Colorado is unable to determine any system or theory on which the defendants in said last named suit were selected, or whether the defendants therein have any scattered priorities for the use of water. This defendant is without knowledge as to whether any towns or cities are not made parties defendant in said last named suit; or whether the defendants in the last named suit brought by the Finney County Water Users' Association are interested in asserted priorities, the places of taking and using of which are a long distance from each other.

This defendant denies that by either of said two last named suits the Finney County Water Users' Association will endeavor to cause to be adjudicated the relative rights of Colorado in the benefit of the waters in said river as against Kansas; and denies that the said district court has announced its determination and duty to make any such adjudication.

This defendant is without knowledge whether there are also ditches in Kansas, located between the ditches of the Finney County

Water Users' Association and the Colorado boundary, for which are asserted claims equal to or better than those of said association. This defendant denies that the said district court has decided to determine the present extent of the diversion, uses and needs of the whole state of Kansas and the whole state of Colorado, and the relations of the uses and depletions of the waters of the Arkansas river in Colorado and in Kansas in said two last-named suits. This defendant is without knowledge as to the contentions made by the defendants in said two last named suits.

This defendant alleges that many of the allegations contained in said paragraph twelve of the bill of complaint are immaterial and many are conclusions of law.

This defendant alleges that it represents other irrigators in Kansas than the United States Irrigating Company and the Finney County Water Users' Association.

THIRTEENTH.

This defendant admits the allegations of the thirteenth paragraph of the bill of complaint not herein denied, or as to which this defendant states it is without knowledge.

This defendant is without knowledge whether the claims to the appropriations and use of water for the purpose of irrigation in Colorado of many of the defendants in the suit by the United States Irrigating Company and in the two suits by the Finney County Water Users' Association, in the United States District Court for Colorado, hereinbefore referred to, were initiated, valid, effective or in use under the ordinary doctrine of appropriation prior in date to the filing of the bill of complaint in the case of *Kansas v. Colorado*.

This defendant denies that any of the rights or claims of the Finney County Water Users' Association were included, considered, or adjudicated by the decree in the case of *Kansas v. Colorado*, or

that said association is in any wise bound by said adjudication, or that the same is *res judicata* as between said association and any individual appropriators or users of water in the state of Kansas, or in the state of Colorado, or as between said association and the state of Colorado.

FOURTEENTH.

The defendant admits the allegations in the fourteenth paragraph of the bill of complaint not herein denied, but does not admit any conclusions of law, and alleges that many of such allegations are immaterial.

Referring to the two suits brought by the Finney County Water Users' Association in the United States District Court for Colorado, this defendant is without knowledge whether by any adjudication therein any appropriators of water in Colorado, not made parties defendant in those two suits, would be able to maintain, as against the Finney County Water Users' Association, any claim to the use of water, or would be permitted to use any water which the defendants in said suits would not be permitted to use; and is without knowledge whether there will be any further attempts to adjudicate water rights in the United States District Court for Colorado in addition to the attempts by means of those two suits; and is without knowledge whether said District Court would be free to appoint separate administrative officers to enforce in Colorado the rights of any Kansas claimants to the use of water.

This defendant denies that any adjudication which might be entered in either of said two suits in the United States District Court for Colorado, if the plaintiffs should recover, would take the form of a determination that the plaintiff is entitled to assert its priority without regard to the state of Colorado or the state of Kansas, or the systems of distribution and the laws of each of said states; and denies that by any such adjudication any such ownership by Colo-

rado (if any such there be), and the administration of Colorado would be disrupted and destroyed; and denies that any decrees in either of said two suits would require discretionary administration; and denies that any such decree could not anticipate recognition and obedience by parties not before it or by state officials; and denies that said District Court has not, or would not have, judicial machinery to make such decree effective without waste of water or great injustice. This defendant denies that any decree in any suit other than said two suits would arrive at different estimates and adjudications of the relative rights of the parties. This defendant denies that there is development in the use of returned water in Colorado along the Arkansas river or tributaries thereof; that is, waters flowing or percolating back to the stream after irrigating use; and denies that many factors are producing changes which require water administration to adapt itself constantly to new conditions; and denies that the evolution of the Colorado system of water administration is still in process. This defendant denies that any attempt by decree of court to interfere in the details or lay down rules in respect to the claims for the use of water of residents or citizens of either state will retard the development and the administrative machinery of Colorado, and destroy any benefits already obtained therefrom; and denies that any attempt by decree of court to enforce the recognition of the rights of any particular appropriator of water in Kansas as against any appropriator of water in Colorado would be destructive of public order, or would be impossible of intelligent administration or obedience, or would produce waste and destruction of the water resources claimed by either state; and denies that any adjudication or modification of the rights of an appropriator or group of appropriators in Colorado affects, disturbs and interferes with other appropriators and diverters of water in Colorado, or disturbs and affects the system of initiation, adjudi-

cation and administration of water in Colorado; and denies that to regulate the diversion of water to enforce the individual claims of a water appropriator in Kansas would affect or substantially destroy the jurisdiction of Colorado over the administration of the waters of the Arkansas river and its tributaries; and denies that any such adjudication would contradict or interfere with the daily administration of water diversions upon the Arkansas river or its tributaries in Colorado, or the operations of the officials of Colorado in water administration; but alleges that the administration of such water diversions and the operations of the water officials of Colorado would be required to be in harmony with and in obedience to such adjudication; and this defendant alleges that it would be practicable to have the administration of water diversions and the operations of the water officials of Colorado subordinate to and in harmony with any such adjudication. This defendant denies that any determination of the rights of individual Kansas appropriators of water against individual Colorado appropriators of water is impossible of performance or of intelligent obedience, or would affect and confuse many irrigation users in Colorado; and denies that any court injunctions as between appropriators of water in Colorado and in Kansas would collide with the action of any state water officers of Colorado, or would disrupt the water administration of Colorado.

FIFTEENTH.

This defendant is without knowledge concerning the subject matter of the following-described allegations of the fifteenth paragraph of the bill of complaint; that is:

(*a*) Whether Colorado owns the Monument Reservoir in El Paso county, Colorado, diverting and storing water from Fountain creek, a tributary of the Arkansas river, and administered as a reservoir

having a priority, the waters of which are distributed among appropriation owners on the stream below.

(b) Whether Colorado has constructed and owns the Boss Lake Reservoir in Chaffee county, Colorado, diverting and storing water from Cottonwood creek, Chalk creek and the South Arkansas river, tributaries of the Arkansas river, which is administered as having a reservoir priority, and the waters thereof distributed among the appropriators on said stream.

(c) Whether in connection with the State Penitentiary at Canon City, Colorado owns and operates a farm and applies thereon water from the Arkansas river, diverted through the Canon City Hydraulic and Irrigating Ditch, and also uses water for irrigation purposes from the Arkansas river diverted through the municipal diversion system of Canon City, and also uses the Union Mill Ditch, used for power purposes.

(d) Whether in connection with the State Hospital for the Insane at Pueblo, Colorado carries on considerable farming operations for the support and use of said institution, diverting water through the West Pueblo Ditch under various usufructuary rights assigned to said ditch on the Arkansas river, with priorities of various dates from 1872 to 1883.

(e) Whether in connection with the State Institution for the Deaf and Blind at Colorado Springs, Colorado irrigates and uses for domestic purposes water diverted from tributaries of the Arkansas river through the diversion system of Colorado Springs, under usufructuary rights granted said city.

(f) Whether in connection with the State Reformatory located at Buena Vista, Colorado carries on extensive farming operations by irrigation from the Arkansas river and various tributaries, and is the owner of water rights under the Maynard Ditch, the Cotton Creek Irrigation Ditch and the Gold Nugget Ditch, and has under

lease the benefit as lessee of extensive water rights from the Dry Creek Ditch, the Helena Ditch, the Bray Ditch, the Harmony Ditch, the Gold Nugget Ditch and the Fish Ditch, from the Arkansas river and its tributaries.

This defendant alleges that whatever may be the rights of Colorado to said irrigations, Colorado has appeared in this case, submitted to the jurisdiction of the court, and that the claims above alleged by Colorado, if they should be sustained, will be fully protected.

This defendant alleges that the claims of Colorado in connection with said reservoirs, ditches and irrigation undertakings hereinbefore in this paragraph referred to, are subordinate and inferior to the claims and rights of the state of Kansas, its residents and citizens, to take and use water from the Arkansas river in Kansas for irrigation, domestic and municipal uses.

This defendant denies that the adjudication by any court, which does not have jurisdiction of Colorado, its officials and property, that a resident or citizen or water appropriator in Kansas is entitled to require the cessation of diversion or use of water, at any time by any residents or citizens of Colorado, would affect the usefulness and value of any of said reservoirs, ditches or irrigation claims asserted by Colorado; and denies that any claims of Colorado to waters of the Arkansas river and its tributaries would be substantially affected; or that the administration of the waters of the Arkansas river and its tributaries in Colorado would be confused, or hampered, or that any investments of Colorado in canals, state charitable or penal institutions and other state properties would be diminished or destroyed.

SIXTEENTH.

This defendant admits the allegations of the sixteenth paragraph of the bill of complaint not herein denied.

This defendant admits that some negotiations occurred between Colorado and Kansas pursuant to article 1, section 10, clause 3 of the Constitution of the United States, with respect to their respective rights as states in and to the water of the Arkansas river; but denies that any such negotiations were for the purpose of determining the several rights of residents or citizens in Kansas as against residents and citizens in Colorado to the appropriation and use of the water in the Arkansas river; and alleges that no compact or agreement has been effected or made between said two states upon said subject; and that all negotiations and discussions between said two states and their representatives upon said subject have been terminated and abandoned, and had been several years before the filing of the bill of complaint in this case.

This defendant is without knowledge whether there have been negotiations for flood protection for the benefit of the states of Oklahoma and Arkansas which would involve construction in Colorado of dams for irrigation storage and flood restraint by the aid and partially for the benefit of the lower states; but denies that there have been negotiations between Kansas and Colorado on such subject.

This defendant denies that the pendencies of litigation and the possibilities of judgment as between residents or citizens in Kansas and in Colorado, in the cases in the United States District Court for Colorado hereinbefore referred to, have hampered, or do hamper, or threaten to render useless, meaningless and nugatory any efforts of Colorado and Kansas to settle any such matters by compact; and denies that, unless prevented by proper authority, said District Court threatens to proceed and will proceed to enter decrees as be-

tween individual parties which will complicate, embarrass and render ineffective any power, duty or opportunity of Kansas and Colorado to make a compact and agreement concerning the conservation or use of waters flowing in the Arkansas river.

SEVENTEENTH.

This defendant admits the allegations of the seventeenth paragraph of the bill of complaint not herein denied.

This defendant denies that any private rights which exist within the state of Kansas to the use of water from the Arkansas river are derived solely from Kansas under any policy that it may adopt, or from any doctrine that it may from time to time develop; but alleges that Kansas has sanctioned and authorized the use of water within its territory for the purpose of irrigation from the Arkansas river. This defendant denies that any and all rights to use water from the Arkansas river in Kansas, or said river and its tributaries in Colorado, are to be determined, or the quantity thereof allocated, by compact between said states. This defendant denies that Colorado and Kansas are sovereign states, but alleges that they have each a qualified or limited sovereignty. This defendant denies that any progress which may have been made in Colorado in the economic application and use and development of waters for irrigation or other purposes has been in reliance upon the adjudication in the case of *Kansas v. Colorado;* and denies that the distribution of water in Colorado has been wise; and denies that the quantity of water which Colorado has permitted to be taken and distributed from the Arkansas river and its tributaries in Colorado is only that which it is entitled to divert or permit to be diverted from said streams; and alleges that Colorado and its citizens and residents, by its aid and permission, have diverted from the Arkansas river and its tributaries in Colorado large quantities of water which

Kansas and its residents and citizens have a right to be permitted to flow in said river from Colorado into Kansas.

This defendant denies that the institution and maintenance of the said three suits, in the bill of complaint referred to, in the United States District Court for Colorado, one by the United States Irrigating Company, and the other two by the Finney County Water Users' Association, have been in violation of the determination of this court in the case of *Kansas v. Colorado*, or that any decree in either of said suits in favor of the plaintiff therein has been, or would be, in violation of such determination, or has, or would, lay any servitude on territory in Colorado, or would be in defiance of the adjudication in the case of *Kansas v. Colorado*.

EIGHTEENTH.

This defendant admits the allegations in the eighteenth paragraph of the bill of complaint not herein denied, or as to which it states it is without knowledge.

This defendant denies that the said two suits by the Finney County Water Users' Association in the United States District Court for Colorado are maintained and presented in pursuance to rulings by said court and the judge thereof; but alleges that under the rulings of said court and of said judge, the said association has the right to maintain and present such suits. This defendant is without knowledge whether the adjudication in such suits would be in the manner and on the principles prayed for by said association therein; and is without knowledge whether said litigation has annoyed or harassed the defendants therein, or caused them an expense of more than a quarter of a million dollars; and denies that any rights of the defendants therein are wholly dependent upon and included within the authority of Colorado; and denies that such defendants are entitled to any rights or claims to the use of water of the Arkan-

sas river and its tributaries in Colorado under the adjudication in *Kansas v. Colorado*, as against residents and citizens of Kansas claiming the right to take water for the purpose of irrigation from the Arkansas river in Kansas. This defendant denies that any right of Colorado in respect to the use of water of the Arkansas river are threatened to be adjudicated and determined in said suits without recourse to this court; and denies that this court is the only tribunal empowered to determine the issues in said cases. This defendant denies that Colorado has sovereignity with regard to the use of water of the Arkansas river and its tributaries in Colorado; and alleges that any rights and powers of Colorado to pass upon the appropriation and use of such water are subject to the rights and powers of the state of Kansas and the rights of the citizens and residents of Kansas to appropriate and use for irrigation and other purposes water from the Arkansas river. This defendant denies that the defendants in said two suits in the United States District Court for Colorado have exhausted their remedies and denies that said suits are a state-wide calamity, or affect the prosperity or development of the cities, towns and agricultural districts in Colorado.

NINETEENTH.

This defendant admits the allegations of the nineteenth paragraph of the bill of complaint not herein denied, but does not admit the conclusions of law and legal argument therein contained.

This defendant denies that the ultimate prayer, object, and, if successful, the effect of the prosecution of said two suits by the Finney County Water Users' Association in the United States District Court for Colorado, will be to cause either, any part of, or all, of the following described conditions:

This defendant denies that such prosecution would allow the said District Court to assume jurisdiction between states, and of

political matters, or to adjudicate on the policies and sovereign rights of Colorado, or in effect, to entertain a suit against it contrary to the Eleventh Amendment.

This defendant denies that the same would impose on Colorado a perpetual servitude on behalf of Kansas and its citizens, or impose such a servitude upon the territory of Colorado.

This defendant denies that it would remove from Colorado any public ownership, control and administration of the diversions of water from the Arkansas river in Colorado; or, in disregard and indifference to her constitution and laws or in defiance of her rights as a sovereign state, will lead to said District Court taking over the administration of diversions of water from the said river and its tributaries, or destroy local government and local administrative units.

This defendant denies that it would be in violation of the decision in the case of *Kansas v. Colorado*.

This defendant denies that it would enjoin and overturn any rights of parties in Colorado; and denies that any such rights were adjudicated upon in the case of *Kansas v. Colorado;* or that it would ignore, set aside or destroy any benefits of the people of Colorado by virtue of the decision in the case of *Kansas v. Colorado*.

This defendant denies that it would require the water administration officers of Colorado to refuse recognition to any orders or decrees in said two cases in the District Court; and denies that any such order or decree would be destructive of the Colorado system of water administration, or that Colorado would thereby be required to abandon its system of water distribution.

This defendant denies that it would establish an interstate government unknown to the Constitution, and denies that the water from the Arkansas river and its tributaries in Colorado should be administered as a whole by Colorado.

This defendant denies that it would impose upon Colorado any body of federal officers, and that any such body would usurp the functions of state water administration officers; and denies that it would dislocate the system of water administration in Colorado, or would cause any waste of water, lack of proper supervision of water conservation, or any public disorder or any injury to the sovereignty or jurisdiction of Colorado.

This defendant denies that it would throw upon individual appropriators of water in Colorado the burden of defending the claims of the whole state, or that it would impoverish such appropriators.

This defendant denies that it would embarrass, hamper and render nugatory any right and duty of Colorado and Kansas to settle by compact any controversies concerning the use of said water, pursuant to article 1, section 10, clause 3, of the Constitution of the United States.

This defendant denies that it would confirm in the United States District Court for Colorado any jurisdiction to determine in a suit to which the state is not a party any rights of Colorado pertaining to its alleged sovereignty.

This defendant denies that it would confuse and intermingle the respective jurisdictions of the state and federal governments, or the judicial and executive branches of both governments, and that it would impair or destroy the orderly evolution of agriculture, industry and human population in the Arkansas valley.

This defendant alleges that the effect of such two suits, if decided in favor of the Finney County Water Users' Association, would be to enjoin the action of the defendants therein from taking from the Arkansas river and its tributaries in Colorado water to which the said association has the prior right of appropriation.

This defendant denies that Kansas and Colorado have wholly different laws with reference to water and water systems; but ad-

mits that there are differences in such laws; and alleges that under the laws of Kansas the Finney County Water Users' Association has the right to appropriate and take water from the Arkansas river in Kansas for the purpose of irrigation of agricultural lands and incidental purposes.

TWENTIETH.

Answering the twentieth paragraph of the bill of complaint, this defendant denies that no other court but this court has any authority or jurisdiction to adjudicate upon the relative rights of residents and citizens in Kansas to take water for irrigation from the Arkansas river, and of residents and citizens in Colorado to take water from the Arkansas river and its tributaries.

TWENTY-FIRST.

Answering the twenty-first paragraph of the bill of complaint, this defendant denies that Colorado has no adequate remedy at law, or any remedy at law, or any remedy in any court whatsoever except this court, in respect to the matters set forth in the bill of complaint.

TWENTY-SECOND.

Further answering and for the purpose of obtaining affirmative relief, this defendant alleges:

(a) That the course of the Arkansas river across the state of Kansas, measured along the river, is about 370 miles. Said river in its natural condition carried a large volume of water during the greater part of each year in its course in Colorado and in Kansas. In the state of Kansas the valley of said river is a nearly level plain but a few feet above the natural level of the river. Said valley varies from about two to about twenty-five miles in width, and is bounded on each side by higher ground, and the soil in said valley is rich, and with a sufficient supply of water produces an abundant

yield of agricultural crops and grass. Beginning with the western line of Kansas, said river flows through the following counties in said state: Hamilton, Kearny, Finney, Gray, Ford, Kiowa, Edwards, Pawnee, Barton, Rice, Reno, Sedgwick, Sumner and Cowley. At the western boundary of Kansas the average annual rainfall in the valley of said river is about sixteen inches, and such average increases gradually along the course of said river to the point where it crosses the south line of Kansas and enters Oklahoma. For about 190 miles along the course of said river, easterly from the western line of Kansas, the average annual rainfall has been usually not sufficient to raise crops without irrigation, and the source of water for irrigation of the valley of said river in that portion of its course is the water which naturally flowed in said river. The soil in said valley in Kansas has a large ingredient of sand and is usually of a porous character, is underlaid with coarse sand and gravel, so that water will percolate readily through the soil from the river. With the natural flow of water in said river, the water percolated from said river through the soil on each side throughout the entire width of the valley so that there was a water table beneath the surface of the soil, which came up to a few feet below the surface, and which aided by furnishing moisture in the production of grass and crops upon the land, and furnished a supply of water by means of wells for domestic, municipal, agricultural and other uses.

(*b*) The state of Kansas has owned since the year 1889 a tract of land in said valley in Ford county, Kansas, and adjoining said river, which it has used and does use for the maintenance of a Soldiers Home thereupon. Said tract of land originally contained about 125 acres, but has been added to, until at the time of the filing of the bill of complaint in this case, it contained about 640 acres. Since the year 1885, the state of Kansas owned a tract of land in said valley near said river in Reno county, upon which it has main-

tained and does maintain a large Industrial Reformatory, and it has used for many years and does use much of said land for farming purposes in connection with said Reformatory. Said tract of land originally contained about 640 acres, but has been added to until at the time of the filing of the bill of complaint in this case it contained about 1,290 acres.

(c) Said valley in Kansas is, outside of the towns, and has been for many years past, settled and occupied by farmers and raisers and feeders of live stock. The population gradually diminishes in density from the east towards the west. The state of Kansas has received a large revenue by means of taxation upon the lands in said valley, but the amount of said revenue gradually diminishes from the east towards the west, and is affected by the water supply of the land in said valley, either by percolation from water flowing in the Arkansas river, or by irrigation directly from such water; and the greater such water supply, the greater the assessment valuation of such lands for taxation and the revenue derived by the state therefrom; and the less such water supply, the less such assessment valuation and revenue. Many cities, towns and villages, organized as municipal corporations under the laws of Kansas, are situate in said valley in Kansas, and many adjoining said river; and said municipalities require for their uses and the uses of their residents, supplies of water, and the source of such supplies is either water flowing in said river in its natural condition, or the water percolating through the soil of said valley from said river; and the diminution of such water supply diminishes the amount of water available by such municipalities for their uses and the uses of their residents.

(d) Irrigation of lands in the Arkansas valley in western Kansas by water drawn from the flow in said river was begun as early as the year 1879, and has continued to the time of the filing of the bill

of complaint in this case. Beginning in the year 1879, such irrigation developed rapidly and continuously, so that by the year 1893 there were many ditches which were used to irrigate lands in said valley in western Kansas, and which were supplied by water from said river; and a large acreage of land was irrigated for farming purposes by means of such ditches and such supply of water. Such irrigation resulted in the raising of large and valuable agricultural crops upon the land so irrigated, and there were many residents and citizens of Kansas engaged in farming, by means of irrigation, such lands so irrigated. After 1893 some additional ditches were constructed in said valley in western Kansas for the purpose of irrigating lands by means of water from said river; and a large amount of farming was conducted by means of water furnished by said additional ditches; and many residents and citizens of Kansas were engaged in farming lands by means of irrigation from said ditches, and large and valuable crops were raised upon said lands.

(e) At the time of the filing of the bill of complaint in this case the following irrigation ditches were in existence in said valley in western Kansas, and supplied, when it was available, water for agricultural irrigation from the Arkansas river of lands in Kansas. The intakes of said ditches on said river were in Kansas, excepting that of the Frontier Ditch. Such ditches, with the location by counties, and the dates when the construction was begun, and when they appropriated and began the beneficial use of water for irrigation from the Arkansas river, are set out as follows:

The Frontier Ditch, in Hamilton county; the ditch begun and water appropriated in the year 1892. The intake of this ditch is in Colorado, about one mile and a half from the Kansas line.

The Alamo Ditch, in Hamilton county; ditch begun and water appropriated in 1883.

The Fort Aubrey Ditch, in Hamilton and Kearny counties; ditch begun and water appropriated in 1882.

The Amazon Ditch in Kearny county and Finney county; ditch begun and water appropriated in 1887.

The South Side Ditch, in Kearny county and Finney county; ditch begun and water appropriated in 1880.

The Great Eastern Ditch, in Kearny county and Finney county; ditch begun and water appropriated in 1881.

The Finney County Water Users' Association Ditch in Kearny county and Finney county; ditch begun and water appropriated in 1880.

The Garden City Ditch in Finney county; ditch begun and water appropriated in 1879.

And also, the Eureka Ditch, which was begun and which began the beneficial use of water for irrigation for agricultural purposes, but was not in actual use for irrigation at the time of the filing of the bill of complaint in this suit, owing to the scarcity of water in the Arkansas river caused by the increased taking of water from such river and its tributaries in Colorado for the purpose of irrigation in that state, but had been in such use for many years, and has not been abandoned; situated in Gray county and Ford county.

Besides, there have been several other ditches for which water was appropriated from the Arkansas river and beneficially used for irrigation for agricultural purposes, and which were built in the said valley in western Kansas many years prior to the filing of the bill of complaint in this suit, but which had not been used for the purposes of irrigation for a number of years prior to such time owing to the scarcity of water in the Arkansas river caused by the increased taking of water in such river and its tributaries in Colorado for the purpose of irrigation in that state. Among such ditches were: One, located in Hamilton county, the intake of which was

located in Colorado about two miles and a half west of the Kansas line, and which was built and the water appropriated therefor from said river in 1884, and which has been known as "Taylor's South Side Ditch"; and another ditch on the south side of the said river in Hamilton county, which has been known as the "West Kansas Flood Ditch," which was built and the water therefor appropriated in the year 1908; and two ditches in Ford county, one on the south side, and the other on the north side of said river.

The said ditches, which were in operation at the time of the filing of the bill of complaint in this case, were irrigating, when water was available therefor from the Arkansas river, over 70,000 acres of land in Kansas for the purpose of raising agricultural crops; and the said Eureka Ditch was capable of irrigating, if water were available from the Arkansas river, many thousands of acres of land for the purpose of raising agricultural crops; and the other ditches, which were not in use at the time of the filing of the bill of complaint in this case, were capable of irrigating, if water were available from the Arkansas river, many thousands of acres of land for the purpose of raising agricultural crops. At the time of the filing of the bill of complaint in this case, farming was actually conducted upon land served by those of said ditches which were then in operation to the extent of about 70,000 acres for the purpose of raising agricultural crops; but on account of the increased taking of water from the Arkansas river and its tributaries in Colorado for the purpose of irrigation, said farming operations, under said ditches in Kansas, were, and had been for a number of years, conducted with difficulty; and the supply of water for irrigation furnished by said ditches from the Arkansas river was, and had been for a number of years, inadequate for the purpose of successfully raising agricultural crops upon said land.

(f) Owing to the continual and greatly increased taking of water from the Arkansas river and its tributaries in Colorado for the purposes of irrigation in that state, from about the year 1880 to the time of the filing of the bill of complaint in this case, the most of the ordinary flow of water in said river from Colorado into Kansas has been consumed in Colorado, and, for a number of years prior to the filing of the bill of complaint in this case, most of the water flowing by said river from Colorado into Kansas has been from extraordinary rains on the plains causing floods in the Arkansas river and its tributaries in Colorado, and such supply of water from floods has been of short duration at each time. For a number of years prior to the filing of the bill of complaint in this case, Colorado has been engaged, by means of reservoirs, in impounding portions of the flood water in said river and its tributaries in Colorado in order to serve irrigation ditches in Colorado. Owing to such increased taking of water from said river and its tributaries in Colorado, which has been by the aid and permission and under the purported authority of Colorado, the area of lands irrigated by such ditches in Kansas has been greatly diminished and the amount and value of the crops raised upon such land has been greatly decreased, the citizens and residents of Kansas farming such lands have suffered injury and damage, and it has thereby been made difficult, and from time to time impossible, for them to raise crops upon their said lands. There are large areas of lands lying under said ditches in Kansas which could have been irrigated from said ditches if water had been available therefor from the Arkansas river, and large and valuable crops could have been raised upon such lands; but which have not been irrigated and upon which crops have not been raised, for the reason of the lack of water from said ditches, which lack of water has been caused by the increased taking of water in Colorado herein referred to.

(g) The times of the beginning of construction of said ditches in Kansas, and of the appropriation of waters therefor from the Arkansas river were prior to the times of the beginning of construction of the ditches in Colorado and the purported appropriation of waters therefor from the Arkansas river and its tributaries in Colorado as to most of such ditches, and as to the greater part of the amount of the appropriation of waters for such ditches in Colorado. The parties owning or managing most of said irrigation ditches in Colorado have been, by the permission and aid of Colorado and with its purported authority, for many years prior to the filing of the bill of complaint in this case, taking water from the Arkansas river and its tributaries in Colorado, for the purposes of irrigation in that state, and have thereby deprived of the use of such water residents and citizens of Kansas who had appropriated and put to beneficial use for irrigation for agricultural purposes in Kansas water flowing in said river prior in time to the appropriation of water from the Arkansas river and its tributaries in Colorado for irrigation for agricultural purposes in that state by said parties in Colorado, and which water said residents and citizens of Kansas had the prior right to take and use and for irrigation in Kansas.

(h) On May 20, 1901, the state of Kansas, by leave of this court, filed its bill in equity in this court against the state of Colorado as defendant, seeking to enjoin the taking of water by Colorado, or its residents or citizens, under the permission and aid and with the purported authority of Colorado, to an extent that, as alleged in said bill, deprived Kansas, its municipalities located in said valley in Kansas, and residents and citizens who resided and held or owned lands in said valley in Kansas, of the uses and benefits of the water of said river as it had flowed naturally from Colorado into and through Kansas in said river. Colorado, having been served with

process, entered its appearance in said case. A demurrer to the bill was filed by Colorado, and such demurrer was overruled. The opinion on such ruling is reported in 185 United States Reports, at page 125, 46 L. Ed. 838. Such opinion was rendered April 7, 1902. Thereafter the bill of complaint of Kansas was amended and some additional allegations were made, and wrongful acts were charged against additional defendants who were residents or citizens of Colorado, in the taking of water from the Arkansas river and its tributaries in Colorado to such an extent as to deprive Kansas, its municipalities and its residents and citizens, owning or holding lands situate in the valley of the Arkansas river in Kansas, of the natural flow of the water in said river from Colorado into Kansas, and through Kansas. Issues of fact having been made by answers in said case, evidence was taken by the parties, and the taking of evidence was concluded on June 16, 1905. Said case was heard by this court upon the evidence and upon questions of law. The final decision was rendered May 13, 1907, and the opinion is reported in 206 United States Reports, at page 46, 51 L. Ed. 956. The issues and decisions in that case did not pertain to any questions of priority in the rights of appropriation of water as between residents or citizens of Kansas and residents or citizens of Colorado, but related only to the claims of Kansas to have the water allowed to flow by said river from Colorado into Kansas as it had naturally flowed. The bill of complaint in that case was dismissed without prejudice to any future suit by the state of Kansas pertaining to the flow of water in the Arkansas river from Colorado into Kansas.

(*i*) The issues in this pending case include questions as to the rights of individual appropriators and users of water for the purposes of irrigation in Kansas and in Colorado respectively, and, also, the question of the increased taking of water from the Arkansas river and its tributaries in Colorado by Colorado, or residents and

citizens of Colorado, by its aid, permission and under its purported authority to an extent greater than the taking of water from such river and its tributaries in Colorado at or prior to May 20, 1901, the time of the filing of the bill of complaint in the case of *Kansas v. Colorado*, all to the injury and damage of Kansas, its residents and citizens.

(*j*) This defendant alleges that since May 20, 1901, the date on which the bill of complaint was filed in the case of *Kansas v. Colorado*, the state of Colorado and its residents and citizens, by its aid, permission and with its purported authority, have from time to time and from year to year greatly increased the taking of water from the Arkansas river and its tributaries in Colorado for the purpose of irrigating lands in that state, and have greatly increased the area of lands thereby irrigated, and they have also, for the purpose of irrigation, greatly extended, widened and deepened prior ditches, and have built many new and extensive ditches, and have built many new large reservoirs and enlarged old reservoirs for the purpose of storage of water taken from the said river and its tributaries in Colorado for the purpose of irrigation in that state. During said period the state of Colorado, its residents and citizens, with its aid, permission and purported authority, have built reservoirs in Colorado of large storage capacity for the purpose of irrigation in that state, and have stored water taken from the Arkansas river and its tributaries in Colorado, and the amount of water taken from the river and its tributaries in Colorado and stored in reservoirs in that state for the purpose of irrigation and used for irrigation has been greatly increased. The water taken from said river and its tributaries in Colorado as aforesaid and the water stored in said reservoirs as aforesaid has been and is continuing to be used in Colorado for the purpose of irrigation to raise agricultural crops.

As the result of said conduct by Colorado and its residents and

citizens, by its aid, permission and purported authority, the flow of water of the Arkansas river from Colorado into Kansas and across the state of Kansas has been in said period greatly diminished, and the supply of water available for irrigation in Kansas from the Arkansas river has been greatly decreased; and it has been made difficult and sometimes impracticable for farmers served by said irrigation ditches in Kansas to raise crops, and the amount of crops raised by them has been greatly decreased.

Municipalities located in the Arkansas valley in western Kansas, and individuals residing in said valley in western Kansas have obtained, and do obtain, their water supply for municipal purposes and for domestic purposes respectively, and such individuals obtain, and have obtained, their supply of water for live stock, from wells sunk or driven in said valley. As a result of such increased taking of water from the Arkansas river and its tributaries in Colorado, the level of underground water in the valley of the Arkansas river in western Kansas has been substantially lowered, and it has been made more difficult and expensive to obtain water by pumping from the wells referred to for the uses of said municipalities, and the uses of the people residing therein, and the individuals aforesaid.

(k) This defendant alleges that the defendant, the Finney County Water Users' Association, is a corporation organized and existing under the laws of Kansas, with authority, among other things, to take and store water from the Arkansas river, and to use and sell the same for irrigation of lands for agricultural purposes; and that said association owns, maintains and operates an intake to procure water for such purposes from said river, which intake is situate in the eastern part of Kearny county, Kansas, and near the western boundary of Finney county, Kansas; and that said association owns, maintains and operates ditches in Kearny county and in Finney county, Kansas, for the purpose of the conveyance of such

water and the delivery of the same to irrigate lands for agricultural purposes, which water it sells to the owners or occupants of lands for such irrigation. Such ditches and lands are situate in the valley of said river in said counties. This defendant alleges that said association began the construction of said intake, and began the construction of its said ditches, and appropriated said water for said purposes, in the year 1880, and that its right of said appropriation of water is to the extent of 250 cubic feet of water per second, and sufficient to irrigate lands for agricultural purposes, if the water were available, to the extent of about 20,000 acres of land. Said right of appropriation of water, and said intake and ditches were first owned by the Kansas Irrigation, Water Power & Manufacturing Company, a corporation organized and existing under the laws of Kansas and with powers similar to those of said association, and such rights and interests passed through intermediate parties and were conveyed, transferred and assigned to and became vested in the said association. Said right of appropriation of water from the Arkansas river, so vested in said association for said purposes, was begun and took effect prior to the initiation or the taking effect of any claims or asserted rights of appropriation of water by residents or citizens of Colorado from the Arkansas river or its tributaries in Colorado, who are hereinafter named, and who are defendants in the said two suits which were brought by said association in the United States District Court for Colorado, and which two suits have been heretofore in this answer referred to. Said residents and citizens of Colorado, defendants in the first of said two suits, are named as follows:

The Graham Ditch Company; The Fort Bent Ditch Company; The Fort Lyon Canal Company; The Oxford Farmers Ditch Company; The Rocky Ford Canal, Reservoir, Land Loan and Trust Company; The Rocky Ford Ditch Company; The X. Y. Irrigation

Ditch Company; The Bessemer Irrigating Ditch Company; The Holbrook Irrigation District; The Otero Irrigation District; The Arkansas Valley Sugar Beet and Irrigated Land Company; The Lamar Canal and Irrigation Company; The Reorganized Catlin Consolidated Canal Company; The Manvel Canal and Irrigation Company; and the Twin Lakes Reservoir and Canal Company. Each of said companies is a corporation.

Said residents and citizens of Colorado, defendants in the second of said two suits, are named as follows:

The Coler Ditch and Reservoir Company, a corporation; Bruce Tirey; The Nepesta Ditch & Reservoir Company, a corporation; Jas. G. Hamilton; The Town of La Veta, Colo.; Charles L. Martin; Henry R. Carson; W. H. Freeland; Samuel Fielden; Wm. R. Owens; A. M. Tujillo; Pedro A. Sanchez; Epefanio Trujillo and Antonio Trujillo; Fred J. Walsen; Samuel J. Capps and Harry J. Capps, and W. C. H. Capps; Alexander Levy; Juan D. Montez; Albert E. Parks; Evelyn E. Atchison and Demster H. Bailey; Jose Filomeno Cardenas; Joe Brunelli and Chas. Brunelli; Harry G. Hamilton; Blanche Hamilton; Samuel Halloway; The Cucharas Irrigation Company, a corporation; The Town of Walsenburg, Colo., a municipal corporation; R. H. Owens; Orson E. Clark; Juan N. Salas; Castulo Gallego; Marina Cruz; Lucy Potyralski; Wm. B. Martin; Thos. J. Quillian; The Orlando Canal Reservoir Company, a corporation; Faustin Baca; Jeff B. Farr; Placida Cortez; Medardo Espinosa; The Butte-Mesa Reservoir and Land Company, a corporation; Wm. Speed; Pedro A. Gomez; Thos. J. Martin; Antonio D. Valdez; Alvi S. McIntyre; James S. Shearer; Henry Parsons; Susana J. Martinez; Walter N. Houser and Percy Houser; Jacob E. Marker; The Welton Land & Water Company, a corporation; George Zember and Zuzu Zember; M. Perrino; Peter Hansen and Peter Verlift; John R. Owens; Doloritas M. Valdez; E. C. Wright; Eliza A. Brink;

Edward Miller; Malley Ball; The Huerfano Valley Ditch & Reservoir Company, a corporation; J. O. Nelson (Red Top Ditch & Reservoir Company); A. P. Sickman; Carlos E. Romero; Karl Speilman; Annie Wilson; T. J. Thorn; Jesse A. Roche; Emil Schmidt; A. P. Samples; Edwin P. Smith; Bruce Smith; Juan Portue; John Meyer; George Beardsley; Elsworth Bartlett; Abundo Bustos; Teyes Casias; The Swink Ditch & Reservoir Company, a corporation; Highland Irrigation District, a corporation; Frank and Cornelia Mallet; John T. Case; D. N. Case; J. D. Case; John Bumgartner; A. R. Wait; The Holbrook Irrigation District, a corporation; Arkansas Valley Sugar Beet & Irrigated Land Company, a corporation; The Box Springs Canal & Reservoir Company, a corporation; The Bob Creek Reservoir Company, a corporation; The Lewis Canal & Reservoir Company, a corporation; Boon Best; The Hardesty Reservoir, Canal and Land Company, a corporation; The Prairie Land and Irrigation Company, a corporation; John H. Cowden; The Vank Skike Ditch & Reservoir Company, a corporation; The Timpas Creek Reservoir, Ditch and Land Company, a corporation; The Red Top Reservoir, Canal and Land Company, a corporation; Reubin A. Sawyer; Edward E. Sirris; Thomas B. Downey; B. B. Hosler; Edward Lee; The Ordway Ditch and Reservoir Company, a corporation; The Lolita Land, Town and Irrigation Company, a corporation; Crume Epler; James W. Garrett; George Lewis; The Consolidated Extension Canal Company, a corporation; Fred A. Crooks; W. T. Reese; John J. Drinkard; The Cow Butte Land & Irrigation Company, a corporation; George McDermott; Frank McDermott; The Apishapa Consolidated Irrigation Company, a corporation; Arthur W. Millikin; O. D. Hollenbeck; J. M. Garlow; The Colorado Fuel and Iron Company, a corporation; The John Flood Ditch Company, a corporation; Elmer Quick; The City of Trinidad, Colorado; The Mutual Cary Irrigation Company, a cor-

poration; Gus Jeannin; The Model Land & Irrigation Company, a corporation; J. W. Hoback; John Arnett; Samuel T. Brown; E. Von Bruddenbrock; Phily Schneider; Hugh Linder; August Haurin; Emiliano Cutierrez; W. G. Rupp; Charles M. Watkins; A. P. Callahan; The Fountain Mutual Irrigation Company, a corporation; The Lincoln Park Ditch & Reservoir Company, a corporation; Valley Investment Company, a corporation; The Teller Land & Irrigation Company, a corporation.

This defendant alleges that each of said defendants in said two suits in the United States District Court for Colorado, for a number of years past, including prior to the year 1916, and with the aid, permission and with the purported authority of Colorado, has taken water from the Arkansas river and its tributaries in Colorado, and used the same for the purpose of irrigation of land for agricultural purposes in Colorado, most of which water, if it had not been so taken, would have flowed by the channel of the Arkansas river from Colorado into Kansas and to the point where the intake of said association is located in Kearny county, Kansas, and would have been available for irrigation by means of the ditches of said association of lands for agricultural purposes in Kearny county and in Finney county, Kansas. The effect of such taking of water from the Arkansas river and its tributaries in Colorado by said parties in Colorado has been to greatly diminish the flow of water from Colorado into Kansas by the channel of said river to the location of said intake of said association, and to greatly diminish the supply of water which would have otherwise flowed into the ditches of said association through said intake. This defendant alleges that such taking of water by said parties in Colorado has been greatly increased from time to time and from year to year for a number of years past, from the year 1880 down until the time of the filing of the bill of complaint in this suit on January 3, 1928; and the said

taking of water by the said parties in Colorado has resulted in a great and constant depletion of the supply of water which would otherwise have been taken and sold by said association for the purpose of irrigation of lands in the valley of said river in Kearny and in Finney counties, Kansas, and has caused the supply of such water for the purpose of the irrigation of such lands to be so reduced that it is, and for many years past has been, difficult and oftentimes impracticable for said association to obtain or furnish a sufficient amount of water for the irrigation of lands in said valley lying under the grade of its ditches, and has caused the abandonment for agricultural purposes of many thousands of acres of land lying under said ditches, and has caused many partial and many total failures of crops upon the lands lying under said ditches, which have been occupied or owned by residents or citizens in Kansas, and has caused a great financial loss to said association and to said residents and citizens of Kansas.

This defendant alleges that the rainfall in Kearny county and Finney county is not and has not been sufficient to grow crops without the aid of irrigation, and that the average annual rainfall in Finney county is and for many years past has been 19.51 inches, and a little less in Kearny county. This defendant alleges that if it were not for such taking of water by said parties in Colorado from the Arkansas river and its tributaries in that state, the supply of water flowing in the Arkansas river at the intake of said association in Kearny county, Kansas, would have been and would be sufficient to furnish water for irrigation to the lands lying under the grade of the ditches of said association.

(*l*) The residents and citizens of Colorado who have been taking water for irrigation of lands in Colorado from the Arkansas river and its tributaries in Colorado threaten to continue to take such water to the extent hereinbefore described, and the state of Colorado

threatens to aid and permit the same; and said conduct will continue unless enjoined by this court.

Said residents and citizens of Colorado threaten to and will, unless enjoined by this court, increase the taking of water from the Arkansas river and its tributaries in Colorado for irrigation of lands in that state, and the state of Colorado threatens to aid and permit the same; and such conduct, unless enjoined by this court, will continue until there will be no water available in said river in western Kansas to furnish water for irrigation to lands in said valley by means of any of the irrigating ditches there situate.

All of said conduct of said residents and citizens of Colorado and the state of Colorado have been, are, and will be to the great injury and damage of the residents and citizens of Kansas owning or operating irrigation ditches in said valley in western Kansas and to the owners and occupants of lands in said valley which have been served or can be served by said ditches if water from said river were available.

(*m*) This defendant alleges that it has no adequate remedy at law, or any remedy at law, or any remedy in any court whatsoever except in this court, in respect to the matters herein set forth.

WHEREFORE, this defendant, the state of Kansas, prays that each of the said parties in Colorado named in the preceding numbered paragraph, defendants in said two suits pending in the United States District Court for Colorado, brought by the Finney County Water Users' Association, should be required by order of this court in the alternative, either to file a written statement in this case to the effect that the state of Colorado represents each of them respectively in all of the issues of this case the same as if they were parties herein, and that they will be bound by any orders or decrees of this court in this case the same as if they were parties herein; or else that the said parties in Colorado be made parties defendant to this

suit, and in such contingency that this court issue subpœnas or other proper process to each of such parties, summoning each of them to appear herein and present their answers, if any, to the claims for affirmative relief of the state of Kansas hereinbefore set forth, and to abide by the determination of this court; and this defendant further prays that this court will protect and quiet the rights of the state of Kansas, its citizens and residents under the adjudication in *Kansas v. Colorado;* that it will protect and quiet the rights of citizens and residents of Kansas to their appropriation of water in the Arkansas river for irrigation of lands in Kansas as against the acts of parties in Colorado who have later rights or no rights to take water from the Arkansas river or its tributaries in Colorado for the purpose of irrigation; and that it will protect and quiet the rights of the defendant, the Finney County Water Users' Association, to the taking or appropriating of water from the Arkansas river in Kearny county, Kansas, for agricultural irrigation, as against the state of Colorado, and as against the parties in Colorado named in the preceding numbered paragraph; that the rights of residents or citizens of Kansas to divert water from the Arkansas river for the purpose of agricultural irrigation of lands in Kansas be decreed in second feet; that the state of Colorado, and its officers, agents and employees, and all residents or citizens of Colorado, who shall be parties to this suit, be perpetually enjoined from diverting any water from the Arkansas river or its tributaries in Colorado until the rights of said citizens or residents of Kansas to divert water from the Arkansas river shall be satisfied; that the state of Colorado and its officers, agents and employees, and all residents or citizens of Colorado, who shall be parties to this suit, be perpetually enjoined from diverting water from the Arkansas river or its tributaries in Colorado, to the injury of the rights of the state of Kansas,

its residents or citizens; and that this court will make and issue such orders and give such other further and different relief as may be just and equitable.

THE STATE OF KANSAS,

By—

WILLIAM A. SMITH,
Attorney-general of the State of Kansas,

JOHN G. EGAN,
Assistant Attorney-general of the State of Kansas,

CHESTER I. LONG,
Solicitors for the State of Kansas.

APPENDIX A.

QUOTATIONS FROM AND REFERENCES TO KANSAS STATUTES ON THE SUBJECT OF IRRIGATION.

General Statutes of Kansas, 1868.

CHAPTER 23.

CORPORATIONS.

SEC. 4. Private corporations may be created by the voluntary association of five or more persons, for the purposes and in the manner mentioned in the following sections of this article.

SEC. 5. The purposes for which the private corporations, mentioned in the last section may be formed are: . . . *Thirty-fourth*, The construction and maintenance of canals for the purposes of irrigation or manufacturing purposes. (Pages 191-192 *id.*)

SEC. 89. Every canal corporation, for the purpose of irrigation, shall, in addition to the powers heretofore conferred, have power: *First*, To cause such examination and survey for its proposed canal to be made as may be necessary to the selection of the most advantageous route, and for such purpose, by its officers, agents or servants, to enter upon the lands or waters of any person. *Second*, To take and hold such voluntary grants of real and other property as shall be made to it to aid in the construction and maintenance of its canal, ditches and sluices. *Third*, To lay out a canal, not exceeding fifty feet in width, and to construct the same; and, for the purpose of cutting and embankments, to take as much more land as may be necessary for the proper construction and security of the canal or any of its branch ditches or sluices. *Fourth*, To construct its canal across, along or upon any stream of water. *Fifth*, To furnish water for irrigation at such rates as such organization or corporation may by its by-laws and regulations prescribe. *Sixth*, To borrow such sums of money as may be necessary for completing and finishing or operating their canal, and to issue and dispose of their bonds for any amount so borrowed, and to mortgage their corporate property and franchises to secure the payment of any debt

contracted by the corporation for the purposes aforesaid; *Provided*, That damages for any property appropriated by such corporation shall be assessed and paid for as is provided for in case of railroads. (Pages 214-215 *id.*)

Session Laws of Kansas, 1876.

CHAPTER 58.

CORPORATIONS—IRRIGATING OR HYDRAULIC.

AN ACT amendatory of chapter sixty-four of the Laws of 1871, and supplemental to article nine, chapter twenty-three, of the General Statutes of 1868.

Be it enacted by the Legislature of the State of Kansas:

SECTION 1. That section eighty-eight of an act concerning private corporations, passed and approved February twenty-ninth, eighteen hundred and sixty-eight, as amended by chapter sixty-four of the Laws of eighteen hundred and seventy-one be further amended so as to read as follows: Section 88. Lands may be appropriated for the use of a macadam, plank road, telegraph, hydraulic, irrigating corporations in the same manner as is provided in this article for railway corporations, as far as applicable, and any hydraulic or irrigating corporation desiring to conduct water in pipes, canals or raceways, or transmit power by shafting, belting and pulleys, or ropes and pulleys, may obtain the right of way for such pipes, canals, raceways, shafting, belting and pulleys, and ropes and pulleys, in manner as aforesaid; and such pipes, canals, raceways, shafting, belting and pulleys, or ropes and pulleys, may be laid through or over any lands or lots, or along or upon any stream of water, using so much of the water thereof as may be needed for the purposes for which the corporation was organized, or through any street or alley or public ground of any city of the second or third class: *Provided*, That no such canal shall be located through any street or alley or any public ground of any city without the consent of the municipal authorities thereof: *Provided further*, That it shall be unlawful for any corporation or person to locate or construct any irrigating canal along or upon any stream of water, or take and use the waters of any stream in such manner as to interfere with or in any wise hinder, delay or injure any milling or irrigating improvements already constructed or located along or upon any stream of water, or to

diminish the supply of water flowing to or through any established irrigating canal.

SEC. 2. That any hydraulic or irrigating company, organized under the laws of this state, may furnish, sell or lease, for such time as it may determine, any portion of its water or power to any person who may wish to use the same, and may convey water in pipes or canal, and may transmit power by shafting, belting and pulleys, or ropes and pulleys, and may borrow such sums of money as may be necesary for completing and finishing or operating its canals, pipes, dams, mills, or machinery, and may issue and dispose of its bonds for any amount so borrowed, and may mortgage its corporate property and franchises, or any part of the same, to secure the payment of any debts contracted by the corporation for the purposes aforesaid.

SEC. 3. The original section one, chapter sixty-four of the Laws of eighteen hundred and seventy-one, is hereby repealed.

SEC. 4. This act shall take effect and be in force from and after its publication in the *Kansas Farmer*.

Approved March 4, 1876. (Pages 153, 154 *id.*)

Session Laws of Kansas, 1885.

CHAPTER 133.

LIENS OF IRRIGATORS.

AN ACT relating to the liens of irrigators.

Be it enacted by the Legislature of the State of Kansas:

SECTION 1. Any person, association or corporation which shall, under contract with the owner of a tract or piece of land, his agent, trustee, or under contract with the husband or wife of such owner, furnish water for irrigating any portion of said tract of land, shall have a lien upon the whole crop grown upon said tract or parcel of land during the year the water is so furnished, for the full amount of the contract price.

Approved March 7, 1885. (Pages 205, 206 *id.*)

Session Laws of Kansas, 1885.

CHAPTER 134.

INJURIES TO IRRIGATING CANALS.

AN ACT to provide for the punishment of injuries to irrigating canals.

Be it enacted by the Legislature of the State of Kansas:

SECTION 1. Any person who shall willfully or maliciously cut, dig, break down or open any gate, bank embankment, or side of any ditch, canal, flume, feeder or reservoir, the property of another used for the purpose of irrigation, manufacturing, mining, or domestic purposes, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not more than three hundred dollars, and may be imprisoned in the county jail not exceeding ninety days: *Provided*, That this section shall only apply to tracts of lands where said ditch company has secured the "right of way" through the tract of land as cut or opened.

Approved March 7, 1885. (Page 206 *id.*)

Session Laws of Kansas, 1886.

CHAPTER 115.

IRRIGATION.

AN ACT concerning irrigation.

Be it enacted by the Legislature of the State of Kansas:

SECTION 1. The right to the use of running water flowing in a river or stream in this state, for the purposes of irrigation, may be acquired by appropriation. As between appropriators, the one first in time is the first in right.

SEC. 2. Any person, company or corporation entitled to the use of water may change the place of diversion, if others are not injured by such change, and may extend the canal, ditch, flume or aqueduct by which the diversion is made to places beyond that to where the first use was made.

SEC. 3. Any person, company or corporation desiring hereafter to appropriate water, must post a notice in writing at a conspicuous place at the point of diversion, stating therein: First, That such person, company or corporation claims the water there flowing to the extent of —— (giving the number of) inches, measured under a

four-inch pressure, and describing and defining as accurately as may be the place of diversion; second, the means by which such person, company or corporation intends to divert it, and the size of the canal ditch, or flume, or aqueduct, in which he intends to divert it. A copy of such notice must, within ten days after it is posted at the place of diversion, be also posted in a conspicuous place in the office of the county clerk of the county in which such place of diversion is situated, and be recorded by the county clerk in a book to be kept for that purpose.

SEC. 4. Within sixty days after the notice is posted, the claimant must commence the excavation or construction of the works in which such claimant intends to divert the water, and must prosecute the work diligently and uninterruptedly to completion, unless interrupted by stress of weather. By completion is meant conducting the water to the place of its intended use. By a compliance with the above rules, the claimant's right to the use of the water relates back to the time the notice was posted. A failure to comply with such rules shall deprive the claimant of the right to the use of the water as against a subsequent claimant who complies therewith.

SEC. 5. The county clerk of each county where water is appropriated for the purpose of irrigating lands, shall keep a book in which he shall record the notices provided for in this act, together with verified proof of the posting thereof.

SEC. 6. Where any canal, ditch, flume, or aqueduct, which is the property of any individual, company, or corporation, and is used for the purpose of irrigating lands, has been located or constructed upon or over any tract of land with the knowledge or consent of the owner of such lands, or upon or over any tract of land owned by the United States, and prior to the occupation of the same by any settler for the purpose of entry under any act of congress, such location and construction shall be *prima facie* evidence that the same was rightful; and such canal, ditch, flume or aqueduct shall be deemed and held to come within the provisions and protection of section one of chapter one hundred and thirty-four of the Session Laws of eighteen hundred and eighty-five: *Provided, however*, That such canal, ditch, flume or aqueduct shall have been constructed for a period of at least two years prior to the first day of January, A. D. eighteen hundred and eighty-six.

SEC. 7. Any individual, company or corporation who has heretofore constructed any canal, ditch, flume or aqueduct for purposes

of irrigation upon or over lands unoccupied at the time of such construction, who shall maintain the same for the period of five years succeeding such construction, without objection in writing from the owner of such land, or subsequent claimant under the laws of the United States or of the state of Kansas, shall after the expiration of said period of five years, be deemed and held to have acquired a permanent right of way for such canal, ditch, flume, or aqueduct, not exceeding, however, the total width of three times the width of such canal, ditch, flume, or aqueduct.

SEC. 8. When any individual, company or corporation shall have constructed any canal, ditch, flume or aqueduct, for purposes of irrigation over unoccupied lands of another, the damages awarded for the right of way of such canal, ditch, flume or aqueduct shall not exceed the value of the land occupied at the date of such construction, and neither the enhanced value of the land growing out of the construction of such canal, ditch, flume, or aqueduct, nor the subsequent enhancement of its value through settlement made after the construction of such canal, ditch, flume or aqueduct, shall be considered in estimating the damages for such right of way: *Provided*, Such canal was constructed with the knowledge and without protest from the owner of the land.

SEC. 9. This act shall take effect and be in force from and after its publication in the official state paper.

Approved February 19, 1886. (Pages 154-156 id.)

Session Laws of Kansas, 1891.

CHAPTER 133.

IRRIGATION.

AN ACT providing for and regulating the diversion, appropriation, storage, and distribution of waters for industrial purposes within prescribed limits and of the construction, maintenance and operation of works therefor; prohibiting unlawful use thereof or interference therewith; providing for the creation of irrigation districts having certain powers; fixing penalties for and assigning jurisdiction of offenses hereunder; defining the powers and duties of certain public officers; and for other purposes.

Be it enacted by the Legislature of the State of Kansas:

In the manner following; that is to say:

ARTICLE I.

OF THE DIVERSION AND APPROPRIATION OF WATER FOR INDUSTRIAL USES.

SECTION 1. In all that portion of the state of Kansas situated west of the ninety-ninth meridian, all natural waters, whether standing or running, and whether surface or subterranean, shall be devoted first, to purposes of irrigation in aid of agriculture, subject to ordinary domestic uses, and secondly, to other industrial purposes, and may be diverted from natural beds, basins, or channels, for such purposes and uses: *Provided*, That no such diversion shall interfere with, diminish or divest any prior vested right of appropriation for the same or a higher purpose than that for which such diversion is sought to be made without the due legal condemnation of, and compensation for, the same; and natural lakes and ponds of surface water, having no outlet, shall be deemed parcel of the lands whereon the same may be situate, and only the proprietors of such lands shall be entitled to draw off or appropriate the same.

SEC. 2. The appropriation of water hereafter shall, in every case, be deemed and be taken to be accomplished and effectual only as to so much water as shall have been actually applied to beneficial uses within a reasonable time after the commencement of the works by means of which such appropriation is intended to be made, or afterwards where no appropriation has in the meantime been initiated by others, together with the reasonable amount necessary to supply losses by waste, seepage and evaporation; all the residue of the water within the capacity of the canal or other works shall be deemed to be derelict, and liable to appropriation by any subsequent appropriator.

SEC. 7. Every person complying with the provisions of this act, and applying the waters obtained by means of any artesian well to beneficial uses, shall be deemed to have appropriated such waters to the extent to which the same shall be so applied within a reasonable time after the commencement of the works, and such appropriation shall have effect as of the day of commencement of such works, provided the same is prosecuted with reasonable diligence; otherwise, from the time of the application of the waters thereof to beneficial uses.

SEC. 8. Any prior right of appropriation shall exist and continue only by the exercise thereof in a lawful manner, and any failure of

such appropriator continuously to apply such water to lawful and beneficial uses, without due and sufficient cause shown for such failure, shall be deemed an abandonment and surrender of such right.

SEC. 9. Every vested right of prior appropriation or diversion of water for industrial uses shall be subject as to the right of eminent domain, and may be condemned and compensated for, for public and beneficial uses, in the same manner and under the same restrictions and regulations as govern the condemnation of other private property. (Pages 223-226, *id.*)

This act extends from page 223 to page 260 of the Session Laws of Kansas, 1891. The headings of the articles after the first are as follows:

"Article II, of the right of use of water." There are six sections in this article.

"Article III, of right of way and site for works for appropriation and devoting waters to beneficial uses." There are five sections in this article.

"Article IV, of the construction, maintenance and operation of works for appropriating and devoting waters to beneficial uses." There are 32 sections in this article.

"Article V, of the disposal of seepage waters." There are two sections in this article.

"Article VI." This article vests power in the Board of Railroad Commissioners to fix, upon complaint, reasonable charges for water furnished by an irrigation company to users thereof. There are two sections in this article.

"Article VII, of the creation of irrigation districts having certain powers." There are twenty-four sections in this article.

"Article VIII, of unlawful interference with, injury to, or use of, works appropriating and devoting water to beneficial uses, or the water thereof; and of penalties therefor, and proceedings for the punishment of offenses respecting the same." There are twenty-five sections in this article. (Pages 223-260, *id.*)

Session Laws of Kansas, 1899.

CHAPTER 95.

RELATING TO RIGHT OF WAY AND LEASES OF CERTAIN CORPORATIONS.

Section 1 of this chapter amends section 1 of chapter 85, Laws of Kansas, 1891, the same being sections 1397 and 1398 of General Statutes of 1889. It provides, *inter alia:*

"SEC. 1397. Lands may be appropriated for the use of . . . irrigating . . . corporations . . . in the same manner as is provided in this article for railway corporations, as far as applicable; and any . . . irrigating . . . company . . . desiring the right to dam or take water from any stream, to conduct water in canals or raceways or pipes . . . may obtain such right or the right of way for all necessary canals, raceways, pipes . . . in the manner aforesaid; and such canals, raceways, pipes . . . may be laid, carried or stretched on, through or over any land, or lot, along or upon any stream of water, using so much of the water thereof as may be needed for any of the purposes aforesaid, . . . : *Provided further*, That it shall be unlawful for any person or corporation to locate or construct any irrigating canal or raceway along or upon any stream of water, or take and use the water of any stream in such manner as to interfere with or in anywise hinder, delay or injure any milling or irrigating improvements already constructed or located along or upon any stream or water, or to diminish the supply of water flowing to or through any established irrigating canal."

Section 2 of this chapter 95, Laws of Kansas, 1899, amends section 1398 of the General Statutes of Kansas, 1889, and provides, *inter alia:*

"That any . . . irrigating . . . company . . . may furnish, sell, let or lease, for such time as such corporation may determine, any portion of its water . . . to any person or persons, or corporation or partnership, who may wish to use the same, and may convey water in channels, raceways or pipes." (This chapter appears on pages 191-193, Session Laws of Kansas, 1899.)

The Following Quotations are from the Revised Statutes of Kansas, 1923:

Titles of the headings are given of the sections which are not quoted.

17-202. *Authority to incorporate.* The purposes for which private corporations may be formed are: . . . (Clause 37.) The construction and maintenance of dams and canals for the purpose of waterworks, irrigation, or manufacturing purposes.

42-109. *Condemnation of right to take water.* Any and all irrigating-ditch and canal companies which have been heretofore organized or incorporated, or which may hereafter become organized and incorporated, for the purpose of procuring or furnishing water for the purposes of irrigation, which shall desire to condemn the right to take such water from any stream in the state of Kansas, shall have the right to procure such condemnation for such purpose in the following manner. (L. 1889, ch. 165, p. 1; March 27.)

42-110. *Petition to district court; appointment of commissioners.*

42-111. *Notice by such commissioners.*

42-112. *Assessment of damages.*

42-113. *Report of commissioners.*

42-114. *Time for such report.*

42-115. *Appeals from decision of commissioners.*

42-116. *Trial of such appeal.*

42-117. *Filing of report and payment of damages.*

42-118. *Right to take water condemned.*

42-119. *Lien upon crop for water.*

42-120. *Powers of canal corporations.*

42-121. *Water rights and shares in irrigation companies.*

42-122. *Offenses affecting works.*

42-316. *Right of way and site for works for diverting, storing or conveying water.*

42-317. *Condemnation of lands for site or way.*

42-101. *Right to use of running water.* The right to the use of running water flowing in a river or stream in this state, for the purposes of irrigation, may be acquired by appropriation. As between appropriators, the one first in time is the first in right. (L. 1886, ch. 115, p. 1; Feb. 26.)

42-102. *Change of place of diversion.* Any person, company or corporation entitled to the use of water may change the place of diversion, if others are not injured by such change, and may extend the canal, ditch, flume or aqueduct by which the diversion is made to places beyond that to where the first use was made. (L. 1886, ch. 115, p. 2; Feb. 26.)

42-103. *Notice at point of diversion.* Any person, company or corporation desiring hereafter to appropriate water must post a notice in writing at a conspicuous place at the point of diversion, stating therein: *First*, That such person, company or corporation claims the water there flowing to the extent of —— (giving the number of) cubic feet per second, and describing and defining as accurately as may be the place of diversion; *second*, the means by which such person, company or corporation intends to divert it, and the size of the canal, ditch or flume or aqueduct in which he intends to divert it. A copy of such notice, together with proof of the posting thereof, must, within ten days after it is posted at the place of diversion, be filed in the office of the register of deeds of the county in which such place of diversion is situated, and be recorded by such register of deeds in a book to be kept for that purpose. (Revised, 1923; old sections, L. 1886, ch. 115, p. 3; L. 1891, ch. 133, art. 8, p. 25.)

42-104. *Time within which claimant must commence works for appropriation.* Within six months after the notice is posted, the claimant must commence the excavation or construction of the works in which such claimant intends to divert the water and must prosecute the work diligently and uninterruptedly to completion, unless interrupted by stress of weather or other unavoidable circumstance. By compliance with the above the claimant's right to the use of the water relates back to the time the notice was posted. A failure to comply with the above conditions shall deprive the claimant of the right to use of the water as against the subsequent claimant who complies therewith: *Provided*, That in any case wherein such notice has already been posted and the said sixty days

has not yet expired the party or parties posting said notice, or their grantees or assigns shall have six months from the taking effect of this act within which to commence the excavation or construction of the works as herein provided. (L. 1886, ch. 115, p. 4; L. 1911, ch. 216, p. 1; Jan. 27.)

42-105. *Recordation of notices.* The register of deeds of each county where water is appropriated for the purpose of irrigating lands shall keep a book in which he shall record the notices provided for in this act, together with verified proof of the posting thereof. (Revised, 1923; old section, L. 1886, ch. 115, p. 5.)

42-106. *Works prior to 1884.* Where any canal, ditch, flume or aqueduct which is the property of any individual, company, or corporation, and is used for the purpose of irrigating lands, has been located or constructed on or over any tract of land with the knowledge or consent of the owner of such lands, or upon or over any tract of land owned by the United States, and prior to the occupation of the same by any settler for the purpose of entry under any act of congress, such location and construction shall be *prima facie* evidence that the same was rightful; and such canal, ditch, flume or aqueduct shall be deemed and held to come within the provisions and protection of section one of chapter one hundred and thirty-four of the Session Laws of eighteen hundred and eighty-five: *Provided, however,* That such canal, ditch, flume or aqueduct shall have been constructed for a period of at least two years prior to the first day of January, A. D. eighteen hundred and eighty-six. (L. 1886, ch. 115, p. 6; Feb. 26.)

42-107. *Construction of work on or over unoccupied lands.*

42-108. *Measure of damages for right of way.*

42-301. *Diversion and appropriation of natural waters west of ninety-ninth meridian.* In all that portion of the state of Kansas situated west of the ninety-ninth meridian, all natural waters, whether standing or running, and whether surface or subterranean, shall be devoted, first, to purposes of irrigation in aid of agriculture, subject to ordinary domestic uses; and secondly, to other industrial purposes; and may be diverted from natural beds, basins or channels for such purposes and uses: *Provided,* That no such diversion shall interfere with, diminish or divest any prior vested right or appropriation for the same or a higher purpose than that for which such diversion is sought to be made, without due legal condemnation of

and compensation for the same; and natural lakes and ponds of surface water, having no outlet, shall be deemed parcel of the lands whereon the same may be situate, and only the proprietors of such lands shall be entitled to draw off or appropriate the same. (L. 1891, ch. 133, art. 1, p. 1; May 20.)

42-302. *Extent of appropriation; residue of waters.* The appropriation of water hereafter shall in every case be deemed and be taken to be accomplished and effectual only as to so much water as shall have been actually applied to beneficial uses within a reasonable time after the commencement of the works by means of which such appropriation is intended to be made, or afterwards where no appropriation has in the meantime been initiated by others, together with the reasonable amount necessary to supply losses by waste, seepage and evaporation; all the residue of the water within the capacity of the canal or other works shall be deemed to be derelict, and liable to appropriation by any subsequent appropriator. (L. 1891, ch. 133, art. 1, p. 2; May 20.)

42-303. *Right to conduct water along natural channels and withdraw same.* Any person may conduct water into and along any of the natural streams or channels of the state, and may withdraw all such waters so by him turned into such channel at any point desired, without regard to prior appropriations of water from said stream, due allowance being made for evaporation and seepage. (L. 1891, ch. 133, art. 1, p. 3; May 20.)

42-304. *Change of natural channel so as to prevent inflow into ditch or conduit.*

42-310. *Right to continuance of use of water procured from carrier by contract.*

42-311. *Right to take water for domestic uses.*

42-312. *Such person responsible for injury or pollution.*

42-313. *Right to collect and store water.* Any person entitled to the use of water for the irrigation of lands or other purposes whatsoever may, at any time while so entitled to the use thereof, collect and store the same up for use presently thereafter; and the failure to apply or use such waters during the period of such collection and storage shall not be deemed or taken to impair his right in that behalf. (L. 1891, ch. 133, art. 2, p. 4; May 20.)

42-314. *Abandonment of right to use or enjoyment of water.*

42-315. *Right of use of water subject to eminent domain.*

42-321 to 42-329, inclusive, pertain to the construction, operation and maintenance of irrigation works.

42-329. *Distribution of water at source of supply among proprietors of works.* The waters of the several streams and sources of supply shall be distributed among the several canals, ditches, conduits and other works so that the proprietors of each of said works, and those entitled to water therefrom, shall, as nearly as may be, and to the extent of their needs, at all times receive and enjoy the waters to which they are severally entitled; and whenever it shall appear that there is flowing into any such works, water to which the proprietor of any other such works having a prior right is entitled, and that such other works having priority of right is not receiving the water necessary for the consumers of water therefrom, and which ought to flow to the same, the head gate of such works having the excess, and being subsequent in right, shall be closed or partly closed, so that a sufficient amount of water of such stream or source of supply may pass and flow to the said works having the priority of right, to the amount to which the same shall be entitled; and if the proprietors of any such works having such excess and being subsequent in right shall fail or refuse to turn out such supply of water when requested by the party entitled to receive the same so to do, the head gate or waste gate of the works receiving such excess shall be so set and locked by the officer authorized by law to perform such duty as to permit a sufficient amount of said water to pass and flow to the party having the right to receive the same. (L. 1891, ch. 133, art. 4, p. 9; May 20.)

(Effective December 27, 1923.)

APPENDIX B.

A list of some reservoirs, new except one, to store water from the Arkansas river or its tributaries in Colorado, for irrigation of lands in that state, authorized by the state engineer of Colorado in the period 1909-1912, inclusive.

Reservoir No. 1, in the Holbrook Irrigation District. This was an enlargement of a previously existing reservoir.

Dye Reservoir, on the line of the Lake Canal, in the Holbrook Irrigation District.

Schaeffer Reservoir, on Beaver creek, in the northeastern part of Fremont county.

Marion Reservoir, in the southeastern part of Custer county.

Two Buttes Reservoir, on Two Buttes creek, in Prowers county.

Kit Carson Reservoir, in the Big Sandy Irrigation District, in Cheyenne county.

Adobe Creek Reservoir, in Bent and Kiowa counties, about ten miles north of the town of Las Animas.

Spring Run Reservoir, near Colorado Springs, in El Paso county.

Omer Reservoir, on the Apishapa river, in Otero county.

Camp Vigil Reservoir, on Little Fountain creek, in El Paso county.

Meyer Reservoir, near the headwaters of the Huerfano river, in Huerfano county.

Cucharas Valley Reservoir No. 5, on the Cucharas river, in Huerfano county.

The Antero Reservoir.

Mount Pisgah Reservoir, near the headwaters of Four Mile creek, in Teller county.

Clear Creek Reservoir, near the mouth of Clear creek, which flows into the Arkansas river about three miles below the town of Granite, in Chaffee county.

Bradford Lake Reservoir No. 1, in Huerfano county.

Columbine Reservoir No. 2, in Water District No. 16, in Huerfano county.

Beckwith Reservoir, in Water District No. 15, in Pueblo county.

Northfield Land and Reservoir Company No. 4, in Water District No. 10, in El Paso county.

Bent County Reservoir, in Water District No. 67, in Bent county.

Red Top Reservoir, in Water District No. 17, in Pueblo county.

Mountain View Reservoir No. 1, in Water District No. 12, in Custer county.

Cow Butte Reservoir No. 3, in Water District No. 17, in Crowley county.

APPENDIX C.

Acreage irrigated in Colorado from the Arkansas river and its tributaries as reported in biennial reports of the state engineer of Colorado:

Year.	*Acres.*	*Year.*	*Acres.*
1900	317,015	1914	475,892
1901	346,812	1915	503,011
1902	288,991	1916	464,107
1903	No record	1917	464,391
1904	No record	1918	398,119
1905	338,921	1919	No record
1906	376,734	1920	519,993
1907	439,415	1921	482,677
1908	466,357	1922	521,013
1909	No record	1923	517,721
1910	398,956	1924	532,681
1911	487,367	1925	500,546
1912	478,935	1926	544,876
1913	447,499		

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